

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF ELDER AFFAIRS,
OFFICE OF PUBLIC AND
PROFESSIONAL GUARDIANS,

Petitioner,

vs.

Case No. 18-0811

ELIZABETH SELDON SAVITT,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted before Administrative Law Judge Mary Li Creasy in West Palm Beach, Florida, on September 5 through 7, 2018.

APPEARANCES

For Petitioner: Michael McKeon, Esquire
Department of Elder Affairs
4040 Esplanade Way
Tallahassee, Florida 32399-7000

For Respondent: Ellen S. Morris, Esquire
Elder Law Associates, P.A.
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Boca Raton, Florida 33433

STATEMENT OF THE ISSUES

Whether Respondent, a professional guardian ("PG"), engaged in the violations alleged in the Amended Administrative Complaint; and, if so, what is the appropriate penalty.

PRELIMINARY STATEMENT

On February 14, 2018, the Department of Elder Affairs, Office of the Public and Professional Guardian ("OPPG") filed an Administrative Complaint with the Division of Administrative Hearings ("DOAH") alleging that Petitioner, Elizabeth Seldon Savitt, violated various provisions of chapter 744, Florida Statutes, which governs the appointment and conduct of public guardians, and seeking suspension or revocation of her PG registration.

The matter was initially set for final hearing April 25 through 27, 2018. The parties jointly sought, and were granted, a continuance of the final hearing until July 26 and 27, 2018. The parties filed a second motion for continuance, which was granted, and the matter was reset for September 5 through 7, 2018. On August 29, 2018, OPPG filed a Motion for Leave to Amend Complaint and Continue Final Hearing. The amendment was not opposed, but the continuation was opposed by Petitioner. The motion to amend was granted and the motion to continue the hearing was denied. The final hearing took place as scheduled on September 5 through 7, 2018, on the Amended Administrative Complaint ("Amended Complaint").

OPPG presented five witnesses: Petitioner; Anthony Palmieri, inspector from the Clerk of the Circuit Court for Palm Beach County ("Circuit Court"); Twyla Sketchly, Esquire, expert

in guardianship and probate law; Sheri Hazeltine, Esquire; and the Honorable Stephen Cohen (retired), expert in guardianship matters and court monitor for the Clerk of the Circuit Court. Petitioner's Exhibits 1 through 14 and 16 were admitted.

Respondent presented two witnesses: the Honorable Martin H. Colin (retired), Respondent's husband; and Amy B. Bellar, Esquire, an expert in guardianship matters. Respondent's Composite Exhibits 1 and 2 were admitted.

The four-volume Transcript of the final hearing was filed with DOAH on September 27, 2018. Both parties requested, and were granted, an extension of time within which to file their proposed recommended orders, which were taken into consideration in the drafting of this Recommended Order.

Except as otherwise indicated, citations to Florida Statutes or rules of the Florida Administrative Code refer to the versions in effect at the time of the alleged violations.

FINDINGS OF FACT

1. OPPG was statutorily created, effective March 10, 2016, and charged with oversight of registered professional guardians in Florida, including, but not limited to, "[e]stablishing disciplinary proceedings, conducting hearings, and taking administrative action pursuant to chapter 120." Prior to that time, the oversight of PGs was the province of the circuit courts in which they were appointed.

2. PGs are appointed by the court to serve as legal decision-makers for persons determined incapacitated by the court (commonly referred to as "wards"), who are unable to make decisions that affect their health, safety, and well-being. PGs are fiduciaries entrusted with the care of the wards that they serve, and, as such, have an implied duty to act in good faith. The proper conduct and management of guardianship cases requires that guardians must be independent and impartial.

3. PGs appear in court on behalf of their ward through an attorney hired by the PG. In order to be appointed as a PG for a particular ward, the PG is required to file an application with the court. Respondent used the services of attorneys Sherry Hazeltine and Ellen Morris to represent her in guardianship and guardian advocate^{1/} cases.

4. Prior to becoming a PG, Respondent worked with the elderly and had a strong interest in serving children with disabilities and their families. In 2010, Respondent took the requisite 40-hour course, passed an exam, and applied for and was granted registration as a PG for Palm Beach County.

5. Since 2010, Respondent acted as a PG or guardian advocate who was paid for her services, except for cases in which she agreed to serve pro bono. For any case in which Respondent sought compensation as a PG, her billing statement was reviewed

by a case manager, the Circuit Court's auditor, and then was approved by the judge assigned to the case.

6. In 2012, prior to the enactment of the statute creating the OPPG for purposes of overseeing PGs, the Circuit Court Clerk's Division of Inspector General ("IG"), Investigator Anthony Palmieri, began an investigation of Respondent and her practices as a PG. Mr. Palmieri believed Respondent had a conflict of interest serving as a PG in the same division in which her husband, Martin H. Colin, served as a judge.

7. Mr. Palmieri also examined Respondent's friendship with her husband's colleague, Judge David French, who presided over some of Respondent's cases. Mr. Palmieri also investigated Respondent's practice of taking retainers before services were rendered in some of her guardianship cases.

8. On December 8, 2017, Mr. Palmieri provided his Investigation Report ("Report") concerning Respondent to OPPG. The Report served as a basis for drafting the Complaint and Amended Complaint in this matter. At no time prior to the initiation of this action by OPPG against Respondent was she notified that the IG's office was concerned about any of her practices as a PG.

Possible Conflict of Interest--Judge Colin

9. At all times material hereto, Respondent was married to then Circuit Court Judge Martin H. Colin, who served in the South

County Courthouse in the Probate and Guardianship Division until 2015, when he transferred to the Circuit Civil Division. Judge Colin retired in 2016.

10. When Respondent became a PG serving in Palm Beach County, Judge Colin raised the issue of a possible conflict of interest, or appearance of a conflict, with his Chief Judge, Judge Peter Blanc. Judge Blanc told Judge Colin that there would be no conflict, or appearance of conflict, as long as he did not handle Respondent's cases. Further, if any other Circuit Court judge was concerned about a conflict, or perceived conflict, with Respondent serving as a PG in one of their cases, they could recuse themselves.

11. The Probate and Guardianship Division of the Circuit Court handles one of the largest guardianship dockets in Florida. Employees in the Clerk's Office were made aware of the marital relationship between Judge Colin and Respondent, and avoided assigning cases involving Respondent as the PG to Judge Colin. If Respondent entered into an existing case which was previously assigned to Judge Colin, he internally transferred the case to another judge.^{2/}

12. Judge Colin had no role in appointing Respondent to guardianship cases. Generally the family or the attorney representing the ward designates who they would like to use as a guardian. Prior to the implementation of a random "wheel"

process in guardianship cases in 2016, it was up to the judge to designate a PG if one was not designated by the party or their lawyer. No evidence was presented that Judge Colin designated Respondent as a PG for any cases in which he presided.

13. Like the other Circuit Court judges, Judge Colin periodically served as the "duty judge" for purposes of signing routine orders when the presiding judges in cases were unavailable. In this capacity, Judge Colin signed between two to four thousands orders in guardianship and probate cases between 2010, when Respondent became a PG, and 2015, when he changed divisions.

14. OPPG makes much of the fact that over this time, Judge Colin signed seven orders in cases in which Respondent served as the PG. The Amended Complaint, paragraph 12, alleges that, "Respondent failed to take any action to have Judge Colin removed as the judge formally assigned to guardianship and/or guardian advocacy cases to which she was appointed." However, neither Respondent nor Judge Colin had any control of which orders he was tasked to sign as duty judge.

15. Two of the seven orders presented by OPPG do not contain Respondent's name as an individual to be served with a copy of the order. Although Attorney Hazeltine's name appears on the service list for these orders, Attorney Hazeltine represented other PGs in addition to Respondent. Seeing Attorney Hazeltine's

name alone would be insufficient to alert Judge Colin to his wife's involvement in a case. Further, all of these orders were on routine, uncontested matters. Judge Colin convincingly testified that had he been aware of his wife's involvement in any of these cases, he would not have signed the order to avoid any appearance of impropriety.

16. The Amended Complaint repeatedly asserts that Respondent failed to disclose "the conflict of interest inherent in her relationship to Judge Colin." Respondent denies that there is any inherent conflict due to her marital relationship with Judge Colin. Both Judge Colin and Respondent testified that at no time was any conflict or potential conflict brought to their attention by any litigants, lawyers, other judges, or the IG's office.

17. However, it is undeniable that there would be at minimum an appearance of a conflict if Judge Colin presided over cases to which Respondent was assigned as a PG. As explained by OPPG's experts, Attorney Sketchly and Judge Cohen, the marital privilege protects communications between spouses. If Judge Colin presided over Respondent's cases as a PG, they could have ex-parte communications that would not be discoverable. It is possible that they could discuss the merits of the guardianship case, as well as the fee petition of Respondent as the PG.

18. In fact, this potential for conflict was discussed in Baez v. Koelemij, 960 So. 2d 918, 919 (Fla. 4th DCA 1992), a case in which Judge Colin was directed to be removed on a motion for disqualification because the movant's opposing counsel also represented Judge Colin's then-girlfriend, Respondent. Noting that the judicial canons did not require the disclosure by Judge Colin of his relationship with Respondent because they were not a spouse or a relative of the third degree, the court ruled, "the mere fact that neither the canon nor the rule require disqualification or disclosure where the opposing counsel represented a "girlfriend" of a judge, disqualification is still appropriate where a reasonable litigant would have a well-grounded fear of not receiving a fair trial.

19. While the judicial canons do not apply to PGs, as a fiduciary, PGs have a duty of independence and impartiality. Because of this special role between the PG and ward, the PG should disclose any relationship that creates a conflict or potential conflict of interest. Disclosure must include material facts sufficient to allow a ward, a residual beneficiary, the court, or any other interested party, to make an informed decision regarding the appearance of conflict.

20. Respondent completed an application for appointment in every case for which she served as a PG or guardian advocate. In response to the application form's request to identify spouse,

Respondent answered, "Martin H. Colin." According to Respondent, this disclosure was sufficient because the lawyers in the case and the courthouse staff were aware of her marriage to Judge Colin, and the wards were too incapacitated to read or understand the application.

21. However, this simple identification of Judge Colin by his proper name was insufficient to put the ward, their family members, out-of-county lawyers, or other interested persons on notice of the potential conflict. Respondent should have identified her spouse as Judge Martin H. Colin, of the Circuit Court, Probate and Guardianship Division.

22. Significantly, no evidence was presented during the final hearing to demonstrate that Respondent benefited from this failure to adequately disclose her marriage to Judge Colin, or that her wards or other interested parties were in any way harmed. However, failure to adequately disclose a conflict, or appearance of conflict, erodes the public's confidence in the guardianship system.

Possible Conflict of Interest--Judge French

23. Prior to Respondent's becoming a PG in 2010, she developed a friendship with her husband's colleague, Judge French, and his then wife. Judge French also served in the Probate and Guardianship Division of the Circuit Court.

24. Respondent and her husband vacationed as the guests of Judge French and his wife on one occasion for a weekend, sometime between 2006 and 2008. The couples also planned a cruise together that did not happen. No other evidence was presented regarding whether Judge French and Respondent socialized on any other occasion. Respondent testified she did not socialize with Judge French.

25. The fact that Respondent and Judge French traveled together one time does not demonstrate a conflict or potential conflict of interest. Accordingly, Respondent had no obligation to disclose a social friendship that she did not believe would pose a conflict. Importantly, although Judge French presided over cases in which Respondent served as a PG or guardian advocate, at no time did he feel he had to remove himself, or otherwise transfer, a case in which Respondent was the PG. Presumably, Judge French believed that despite this social relationship, he could remain impartial and that his relationship with Respondent did not create a conflict or the appearance of a conflict.

Improper Taking of Retainers by Respondent

26. PGs have a special relationship with their wards. As a fiduciary, they have a duty of loyalty and an obligation to at all times act in the best interests of their wards, and not for personal gain. See § 744.361, Fla. Stat. PGs are prohibited

from borrowing money from their wards. See § 744.454, Fla. Stat. Section 744.108 mandates that guardianship fees must be approved by the court prior to payment. Subsection (1) specifically recognizes that a guardian "is entitled to a reasonable fee for services rendered and reimbursement for costs incurred on behalf of the ward." (emphasis added). This language is in the past tense, and does not make any allowance for payment of advance fees or retainers.

27. According to Attorney Sketchly, Judge Cohen, and Mr. Palmieri, PGs normally prepare periodic bills showing services rendered and the amount of time spent which are submitted to the court. After a bill is reviewed by a case manager and the court auditor, it is then submitted to the presiding judge for approval. Only after the bill is approved by the court can fees be paid to the PG.

28. Attorney Sketchly, Judge Cohen, and Mr. Palmieri, in their combined decades of experience, were not aware of any PGs in Florida taking fees prior to court approval. Respondent's expert, Attorney Amy Beller, also testified that it is never permissible for a PG to take a loan from a ward's estate.

29. In three cases between April 2012 and July 2015,^{3/} Respondent, acting as a PG or guardian advocate, requested and received "retainers"^{4/} for future anticipated services, without prior court authorization. Two retainers were taken in the

amounts of \$1,000.00, and one was taken in the amount of \$2,500.00. Respondent had no set business practice to establish on which cases retainers would be sought or for what amount. Respondent had no written retainer agreements with her clients. Respondent testified she did this occasionally when she anticipated there would be a lot of work up front on the case.

30. The retainers charged by Respondent were reflected as a credit on the bills submitted to the Circuit Court for approval. No notation was contained on the bill as to when the retainer was collected. Respondent did not recall whether the retainers were collected prior to her appointment as PG or before services were provided. The bills for these cases in which retainers were taken were ultimately approved by the Circuit Court.

31. Section 744.446(2) provides that:

(2) Unless prior approval is obtained by court order, or unless such relationship existed prior to appointment of the guardian and is disclosed to the court in the petition for appointment of guardian, a guardian may not:

(a) Have any interest, financial or otherwise, direct or indirect, in any business transaction or activity with the guardianship;

(b) Acquire an ownership, possessory, security, or other pecuniary interest adverse to the ward[.]

32. By taking money from the ward prior to providing any services and prior to court approval, Respondent created a

conflict of interest. Once Respondent took a retainer from her client, she then had a financial interest at stake in seeing her fees were approved.

33. Attorney Sketchly explained that these retainers appeared to be loans to Respondent. The round numbers, randomly taken as "retainers," without any billing prior to the taking of the retainer, or court authorization, suggest Respondent used "retainers" because she needed the money. This constitutes a breach of fiduciary duty, is contrary to the best interests of the ward, and creates a financial interest in the guardianship, which are prohibited by section 744.446. By using retainers, Respondent abused her power as a guardian.

CONCLUSIONS OF LAW

34. DOAH has jurisdiction over the subject matter of and the parties to this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2018).

35. As of March 10, 2016, OPPG was created and given oversight responsibilities for all professional guardians. See § 744.2001, Fla. Stat.

36. In this case, OPPG seeks to revoke Respondent's registration as a PG and potentially affect Respondent's livelihood. As such, OPPG has the burden of proving its allegations with clear and convincing evidence. See Ferris v. Turlington, 510 So. 2d 292, 295 (Fla. 1987) (establishing clear

and convincing evidence standard for license revocation proceedings).

37. "Clear and convincing evidence" means that the evidence must be found to be credible, the facts to which the witnesses testify must be distinctly remembered, the testimony must be precise and explicit, and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

38. OPPG's specific allegations are contained in the Amended Complaint. This tribunal may consider only the allegations in the Amended Complaint because predicated disciplinary action against a licensee on conduct never alleged in an administrative complaint, or some comparable pleading, violates the Administrative Procedure Act. Cottrill v. Dep't of Ins., 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996). Similarly, due process requires that only the allegations in an administrative complaint may be considered in imposing disciplinary sanctions. Matters not charged in an administrative action cannot be considered as violations. See Chrysler v. Dep't of Prof'l Reg., 627 So. 2d 31, 34 (Fla. 1st DCA 1993); Klein v. Dep't of Bus. & Prof'l Reg., 625 So. 2d 1237 (Fla. 2d DCA 1993).

39. In the introductory paragraphs of the Amended Complaint, Petitioner alleges, "Section 744.20041, Florida Statutes, provides that a professional guardian is subject to disciplinary action by Petitioner for failing to perform any statutory or legal obligation placed upon a professional guardian." In the "Wherefore" clause of the Amended Complaint, OPPG seeks the imposition of penalties against Respondent afforded by section 744.20041.

The Application of the 2016 Statute to Respondent's Pre-2016 Conduct Does Not Constitute an Unconstitutional Ex Post Facto Law

40. All of the improper conduct alleged in the Amended Complaint occurred prior to the creation of the OPPG and the March 2016 effective date of sections 744.2001 through 744.20041. As such, Respondent alleges that this is a violation of her due process rights as an impermissible ex post facto law, which deprives her of life, liberty, or property, based on conduct occurring before the effective date of the prohibition.

41. Substantive statutes are presumed to apply prospectively, absent a demonstrated legislative intent to the contrary. In determining whether the Legislature intended that a statutory provision be applied retroactively, courts examine both the statute's plain language and the Legislature's purpose for enacting it. Landgraf v. U.S. Film Products, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed 2d 299 (1994). The Legislature

expressed no intent regarding the retroactive application of sections 744.2001 through 744.20041.

42. However, this "presumption" does not apply when the statute applies a new jurisdictional rule or procedural rule. Application of a new jurisdictional rule usually "takes away no substantive right but simply changes the tribunal that is to hear the case." Landgraf v. Usi Film Products, 511 U.S. 244, 274, 114 S. Ct. 1483, 128 L. Ed 2d 299 (1994) (citing Hallowell v. Commons, 239 U.S. 506, 508-509, 60 L. Ed. 409, 36 S. Ct. 202 (1916)). Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive. Miller v. Florida, 482 U.S. 423, 433, 96 L. Ed 2d 351, 107 S. Ct. 2446 (1997); Landgraf, 511 U.S. at 275.

43. Sections 744.2001 through 744.20041 constitute new jurisdictional and procedural rules. Pursuant to both common law and chapter 744, guardians have long had a fiduciary responsibility to their wards that prohibits acting in any manner contrary to their wards' best interests. The Amended Complaint charges Respondent for violating statutes in effect prior to Respondent becoming a PG. Sections 744.2001 through 744.20041 only change oversight of PGs from the Circuit Court to the OPPG, and provide new remedies for PGs who violate chapter 744.

44. In Lescher v. Florida Department of Highway Safety & Motor Vehichles, 985 So. 2d 1078, 1081 (Fla. 2008), the Florida Supreme Court discussed whether the retroactive application of enhanced penalties constitutes an unconstitutional ex post facto law:

Both the United States and Florida Constitutions prohibit ex post facto laws. See U.S. Const. art. I, § 10; art. I, § 10, Fla. Const. The United States Supreme Court has defined an ex post facto law as one that (a) operates retrospectively, and (b) "make[s] innocent acts criminal, alter[s] the nature of the offense, or increase[s] the punishment." Collins v. Youngblood, 497 U.S. 37, 46, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990); accord Cal. Dep't of Corr. v. Morales, 514 U.S. 499, 506 n.3, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995) ("After Collins, the focus of the ex post facto inquiry is not on whether a legislative change produces some ambiguous sort of 'disadvantage,' . . . but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable."). Thus, the prohibition on ex post facto laws applies only to criminal or penal provisions.

45. The Lescher court utilized the seven factor test enunciated in Hudson v. United States, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed 2d 450 (1997), to determine whether the statutory scheme at issue constituted a civil penalty or criminal punishment. Under Hudson, the first step in the analysis is to ascertain the Legislature's intent, and then to determine the effect of the statute under the following seven factors:

(1) [w]hether the sanction involves an affirmative disability or restraint;
(2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter;
(4) whether its operation will promote the traditional aims of punishment--retribution and deterrence; (5) whether the behavior to which it applies is already a crime;
(6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.

46. Chapter 744 regulates guardianship proceedings and OPPG was created for the purpose of overseeing all public and professional guardians. In section 744.1012, the Legislature clearly expressed its intent:

(3) By recognizing that every individual has unique needs and differing abilities, it is the purpose of this act to promote the public welfare by establishing a system that permits incapacitated persons to participate as fully as possible in all decisions affecting them; that assists such persons in meeting the essential requirements for their physical health and safety, in protecting their rights, in managing their financial resources, and in developing or regaining their abilities to the maximum extent possible; and that accomplishes these objectives through providing, in each case, the form of assistance that least interferes with the legal capacity of a person to act in her or his own behalf. This act shall be liberally construed to accomplish this purpose.

* * *

(5) Through the establishment of the Office of Public and Professional Guardians, the

Legislature intends to permit the establishment of offices of public guardians for the purpose of providing guardianship services for incapacitated persons when no private guardian is available.

47. It is apparent that by enacting chapter 744, the Legislature intended to protect the public through a system of guardianship for the benefit of the most vulnerable citizens.

Application of the Hudson Factors

48. This intent controls absent "the clearest of proof" to transform what has been denominated as a civil remedy into a criminal penalty. Lescher, 985 So. 2d at 1082. To determine whether the "clearest of proof" negates the Legislature's intent to create a civil remedy, the seven Hudson factors must be applied. Two overriding principles govern this analysis: first, no one factor should be considered controlling; and second, the statute is evaluated on its face, not on the character of the actual sanctions imposed. Hudson, 522 U.S. at 101 (quoting and disavowing United States v. Halper, 490 U.S. 435, 447, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989)).

1. Affirmative Disability or Restraint

49. The first factor is whether the sanction involves an affirmative disability or restraint. Hudson, 522 U.S. at 99-100. Section 744.20041 does not impose an affirmative disability as the Supreme Court has applied this factor. See Smith v. Doe, 538 U.S. 84, 100, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003)

(concluding that a state's sex offender registration statute "impose[d] no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint" and its "obligations are less harsh than the sanctions of occupational debarment, which we have held to be nonpunitive"); see also Hudson, 522 U.S. at 496 (concluding that a bar to working in the banking industry was not an affirmative disability or restraint "as that term is normally understood").

50. In Lescher, the Florida Supreme Court examined whether the application of a statute, which eliminated the availability of a hardship license to those who lost their driver's licenses, enacted after the plaintiff's DUI criminal conviction, could be retroactively applied. The court stated:

The loss of one's driving privilege is inconvenient. In fact, we have recognized that the revocation of one's driver's license constitutes a substantial hardship. Nevertheless, the loss of the driving privilege is not an affirmative disability. If the requirement to register as a sexual offender, the loss of the ability to practice in a chosen profession, the termination of Social Security benefits, and the denial of other federal benefits such as food stamps do not constitute an affirmative disability or restraint, then neither does the inability to apply for a hardship license after one's driver's license has been permanently revoked.

Lescher, 985 So. 2d at 1083.

51. Similarly, although the revocation of the PG registration carries the "sting of punishment," and may affect one's income, it does not resemble the punishment of imprisonment. The loss of the privilege of serving as a PG is not an affirmative disability.

2. The Historical View

52. The second factor of the Hudson analysis is whether the sanction has historically been regarded as a punishment. Florida courts have upheld as civil other regulatory remedies that deprive individuals of the enjoyment of certain licensed privileges. See, e.g., State v. Bowling, 712 So. 2d 798 (Fla. 2d DCA 1998) (holding that revocation of a contractor's license was a civil sanction, not a criminal punishment, and did not bar criminal prosecution for fraud in violation of the Double Jeopardy Clause); Rowe v. Ag. for Health Care Admin., 714 So. 2d 1108, 1110 (Fla. 5th DCA 1998) (finding no ex post facto violation where a dentist's participation as a Medicaid provider was terminated upon his criminal conviction based on a statute enacted to protect the public but "did not increase the penalty" for the crimes); Borrego v. Ag. for Health Care Admin., 675 So. 2d 666, 668 (Fla. 1st DCA 1996) (holding that "[i]n Florida, the license to practice medicine is considered a privilege granted by the sovereign" and the state's suspension of appellant's license following a criminal fraud conviction under a statute intended

for public protection did not violate the double jeopardy bar); and Lescher, 985 So. 2d at 1084 (driver's license revocation and the unavailability of a hardship license for persons with four DUI convictions have not been viewed as criminal punishment).

53. Florida courts have held that a licensed privilege may reasonably be regulated. The purpose of suspension or revocation of such a privilege is not to punish the offender, but to protect the public.

3. Scienter

54. The third factor is whether the sanction comes into play only on a finding of scienter. See Hudson, 522 U.S. at 99-100. The registration revocation statute, section 744.20041, does not contain a scienter element.

4. Punishment and Deterrence

55. The fourth factor is whether operation of the disciplinary and registration revocation statute will promote the traditional aims of punishment, retribution, and deterrence. See Hudson, 522 U.S. at 99-100. Section 744.20014 provides for increasing penalties for the PG based upon the severity of the violations. As such, this provision may, to some degree, serve as a deterrent. This provision, however, also serves the Legislature's stated purpose of protecting its most vulnerable citizens. That the statute at issue may serve a deterrent purpose does not automatically render it criminal punishment. As

the Supreme Court warned in Hudson, the "mere presence of this [deterrent] purpose is insufficient to render a sanction criminal, as deterrence 'may serve civil as well as criminal goals.'" Hudson, 522 U.S. at 105.

5. Criminal Behavior

56. The fifth factor is whether the behavior to which the statutes apply is also a crime. See Hudson, 522 U.S. at 99-100. Section 744.20041 subjects a PG to disciplinary action by the OPPG for failing to perform statutory or legal obligations. Obviously removing assets from a ward's estate without authorization could constitute theft or embezzlement. That the conduct addressed by the statutes is also criminal, however, also is insufficient to make the civil remedy of license revocation criminally punitive. See Hudson, 522 U.S. at 104 (a monetary penalty and employment debarment are not criminally punitive merely because the conduct on which the sanctions were based is also a crime).

6. Alternative Purpose

57. The sixth factor is whether an alternative purpose, to which the sanction may rationally be connected, is assignable for it. See Hudson, 522 U.S. at 99-100. In other words, does PG registration revocation serve a legitimate governmental purpose other than punishment? As explained earlier, the Legislature has expressly stated the purpose behind chapter 744 is "to promote

the public welfare by establishing a system that permits incapacitated persons to participate as fully as possible in all decisions affecting them; that assists such persons in meeting the essential requirements for their physical health and safety, in protecting their rights, in managing their financial resources." The system created by section 744.20041 of increasing disciplinary penalties, up to and including registration revocation, is rationally related to that regulatory purpose. It protects the public by restricting the practice of PGs who display disregard for the best interests of their wards.

7. Relationship of Restriction to Purpose

58. The seventh and final factor is whether the sanction appears excessive in relation to the alternative purpose assigned. See Hudson, 522 U.S. at 99-100. The restriction here, registration revocation, is not excessive in relationship to the statute's purpose of protecting the public. Incapacitated persons are clearly more susceptible to harm from a PG who has a pattern of disregarding statutory or legal obligations. Thus, the increasing penalties, up to permanent revocation, are a measured and legitimate exercise of the Legislature's power to protect the public.

59. Of the seven factors reviewed, none support Respondent's claim that the statute is in effect so punitive that it constitutes criminal punishment. Accordingly, use of the

statutory scheme contained in section 744.20041 to punish the actions of Respondent occurring prior to its enactment in March 2016, does not constitute an unconstitutional ex post facto law.

60. Based on this analysis, it is appropriate to examine whether OPPG proved the counts of the Amended Complaint by clear and convincing evidence.

Count I--Violation of Section 744.309(3) (Judge Colin)

61. Count I alleges a violation of Florida Statute 744.309(3), which provides that, "the court may not appoint a guardian in any other circumstance in which a conflict of interest may occur." OPPG alleges that Respondent had a conflict of interest by virtue of her marriage to Judge Colin; that she failed to adequately disclose this purported conflict of interest and that as a result, she was "ineligible for appointment in cases wherein Judge Colin was also involved."

62. The obvious defect in Petitioner's argument is that this provision of section 744.309(3) applies only to judges. Only judges appoint guardians. This statutory provision only proscribes certain guardian appointments by a judge. This action is a disciplinary action against Respondent, not her husband. Thus, without even going into the merits on the conflict of interest issue, this statutory section, on its face, cannot be used to find a violation by Respondent.

63. While pursuant to section 744.309(3) a court may not appoint a guardian who meets the definition of a "disqualified person," OPPG failed to demonstrate by clear and convincing evidence that Respondent ever had a conflict of interest or appearance of a conflict of interest. No evidence was presented showing that Respondent was ever appointed to any guardianship case by her husband, Judge Colin.

64. While it is true Respondent should have disclosed, in detail, her spouse's position as a sitting judge in the Probate and Guardianship Division, her failure to disclose was of no consequence because Judge Colin and the courthouse staff studiously avoided Judge Colin's involvement in any of Respondent's PG cases. At most, Judge Colin, as duty judge, inadvertently signed seven routine orders in cases in which Respondent was, or would become, involved. As such, there is no basis upon which to find Respondent violated section 744.309(3).
Count II--Violation of Section 744.446 (Judge Colin)

65. Section 744.446, prohibits guardians with a conflict of interest from benefiting from any such conflict, unless approved by the court beforehand, and provides that "[i]t is essential to the proper conduct and management of a guardianship that the guardian be independent and impartial."

66. Count II alleges that Respondent failed to disclose her conflict of interest "in cases where Judge Colin also presided"

and that she received compensation for these cases. As discussed above, at no time did Judge Colin appoint Respondent to a case as PG. As soon as Judge Colin discovered Respondent entered a guardianship case in which he presided, he transferred the case to another judge.

67. All fees received by Respondent were, in fact, reviewed by a case manager and court auditor, and then authorized for payment by a judge other than Judge Colin. As such, OPPG failed to meet its burden of proof as to Count II.

Count III--Violation of Section 744.309(3) (Judge French)

68. As discussed above, section 744.309(3) only proscribes judges from making certain guardianship appointments. This action is a disciplinary action against Respondent, not Judge French. Although Judge French did appoint Respondent to guardianship cases, there was no clear and convincing evidence that a conflict existed between Respondent and Judge French by virtue of her traveling with him and his spouse years before she became a PG. OPPG failed to meet its burden as to Count III.

Count IV--Violation of Section 744.446 (Judge French)

69. Because OPPG failed to demonstrate any conflict of interest between Judge French and Respondent serving as PG in cases for which he presided, there can be no showing that Respondent improperly benefitted from those cases. OPPG failed to meet its burden as to Count IV.

Count V--Violation of Section 744.361(3) (Duty of Good Faith)

70. Count V charges Respondent with violation of Florida Statute 744.361(3), which states in its entirety, "the guardian shall act in good faith." Respondent points out that this law did not become effective until July 1, 2015, and the statute does not define "good faith." However it is undisputed for centuries that common law has applied a duty of good faith to a fiduciary relationship. "Good faith" in this context obviously prevents a PG from self-dealing or helping oneself to the ward's assets without court authorization.

71. Amended Complaint, paragraph 58, itemizes the ways in which Respondent allegedly breached this duty. In specifying the alleged bad faith, OPPG primarily relies on the alleged conflicts with Judges Colin and French, which were not proven. See Amended Complaint, paragraphs 58(a), (b), (c), and (e) (which reference conflicts with Judges Colin and French, and conflicts with Respondent and the "judiciary," but not between Respondent and the ward).

72. Amended Complaint, paragraph 58(d), includes an ambiguous catch-all, charging Respondent with failing to act in good faith by, "[c]ontinuing to serve as guardian or guardian advocate in Palm Beach County on cases wherein statutes pertaining to her suitability to receive such appointments were violated." As discussed in detail above, section 744.309(3)

imposes obligation on the court not to appoint disqualified persons.

73. Arguably, section 744.446(2) pertains to Respondent's suitability because it provides:

The fiduciary relationship which exists between the guardian and the ward may not be used for the private gain of the guardian other than the remuneration for fees and expenses provided by law. The guardian may not incur any obligation on behalf of the guardianship which conflicts with the proper discharge of the guardian's duties.
(emphasis added).

74. However, the Amended Complaint nowhere references section 744.446(2). Nor does it reference section 744.454, which prohibits a guardian from borrowing money from the ward. Accordingly, the Administrative Complaint failed to provide adequate notice to Respondent that her taking of retainers without prior court approval of her fees, constituted a breach of the duty of good faith. Accordingly, OPPG failed to meet its burden as to Count V.

Count VI--Violation of Section 744.361(4) (Contrary to Ward's Interests)

75. Count VI charges Respondent with violating section 744.361(4), which provides that a guardian may not act in a manner that is contrary to the ward's best interests under the circumstances. There were no circumstances shown by Respondent that justified the taking of retainers prior to court

authorization for the payment of fees. It was clearly against her wards' best interests.

76. Again, OPPG failed to properly plead its Amended Complaint to include any reference to sections 744.446(2) or 744.454, resulting in Respondent not receiving notice that they could serve as a basis for this count. See Amended Complaint, paragraphs 62(a)-(e). Accordingly, OPPG failed to meet its burden as to Count VI.

Count VII--Violation of Section 744.474(3)

77. Section 744.474(3) provides that a guardian is subject to removal from a case, in addition to any other penalties prescribed by law, if the guardian abuses his or her powers. Arguably, Respondent abused her power as a guardian by taking retainers without prior court approval of her fees. However, nothing in this section, or section 744.2001 through 744.20041 gives OPPG the authority to remove a guardian. That is the exclusive purview of the circuit court which appointed the PG. There is no basis upon which to charge Respondent with a violation of section 744.474(3).

Conclusion

78. Respondent had no conflict between herself and Judge Colin because he did not appoint her or preside over her PG cases. Respondent's marriage to a judge, sitting in the Probate and Guardianship Division in which she practiced as a PG, created

a potential conflict or appearance of conflict that should have been more thoroughly disclosed. Fortunately, it did not result in any benefit to Respondent. OPPG also failed to prove any conflict, actual or perceived, between Respondent and Judge French.

79. Respondent's use of retainers was both a breach of the duty of good faith and not in the best interests of her wards. However, in its first prosecution under sections 744.2001 through 744.20041, OPPG failed to adequately plead these violations.

80. Significantly, no harm was demonstrated to the wards or their families. All of Respondent's fees were ultimately court-approved. Although Respondent's actions, of failing to adequately disclose her marriage to a then sitting Probate Judge, and taking retainers not authorized by law, erode the public confidence in the guardianship system, they are not actionable as charged by the Amended Complaint.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Elder Affairs, Office of Public and Professional Guardians, issue a final order dismissing this case.

DONE AND ENTERED this 21st day of December, 2018, in
Tallahassee, Leon County, Florida.



MARY LI CREASY
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of December, 2018.

ENDNOTES

^{1/} A guardian is appointed in situations when a ward becomes incapacitated to the extent that it is necessary for the guardian's judgment to be substituted for the protection of the ward and the ward's assets. A guardian advocate is usually appointed when the ward is born incapacitated and usually a parent or relative serves as a guardian advocate. The responsibilities to protect the ward's best interests are identical.

^{2/} OPPG contends that the "transfer" of Judge Colin's cases involving Respondent, rather than recusal and reassignment, violated the standing procedures of the court and allowed Judge Colin to bypass the random re-assignment process to shift the case to another judge at the South County Courthouse. The implication is that other judges in the same courthouse would treat Respondent's cases more favorably. Judge Colin testified it was up to the discretion of the individual judge whether to transfer a case. OPPG presented no supporting evidence that the practice of transfer somehow improperly benefited Respondent or harmed her wards. Further, even assuming arguendo that this practice was somehow improper, this proceeding is to examine the conduct of Respondent as PG, not the conduct of Judge Colin.

^{3/} These three cases include: In Re: Guardianship of Helen M. O'Grady, Case No: 502012GA000016XXXXSB; In Re: Guardianship of Carla Simmonds, Case No. 502014AG000327XXXXSB; and In Re: Guardianship of Delores Thur, Case No. 502013AG000262XXXXSB.

^{4/} A "true retainer" is money paid in advance of any services rendered to have a professional available when needed. An "evergreen retainer" is money paid in advance of services in the expectation that the retainer will be used to pay the bill. When it is exhausted, the retainer is replenished to the original amount in anticipation of additional billing. Respondent's "retainers" do not appear to be either a true retainer or an evergreen retainer because it was a one-time payment from a family member, ward's trust, or ward's estate, later reflected as an offset on the Petition for Order Authorizing Payment of Compensation and Expenses of Guardian.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.